



**Rule(s) Review Checklist Addendum**  
(This form must be filled out electronically.)

**This form is to be used only if the rule(s) was/were previously reviewed, and has/have not been amended/repealed subsequent to that review.**

All responses should be in **bold** format.

Document(s) Reviewed (include title): **WAC 458-20-118, Sale or rental of real estate, license to use real estate**

Date last reviewed: **February 23, 2000**

Reviewer: **Gilbert Brewer**

Date current review completed: **May 28, 2003**

Briefly explain the subject matter of the document(s): **Rule 118 clarifies what constitutes a tax-exempt lease or rental of real estate as contrasted with a taxable license to use real estate.**

Type an "X" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

**1. Public requests for review:**

YES	NO	
	<b>X</b>	Is this document being reviewed at this time because of a public (e.g., taxpayer or business association) request?

If "yes," provide the name of the taxpayer/business association and a brief explanation of the issues raised in the request.

**2. Related statutes, interpretive and/or policy statements, court decisions, BTA decisions, and WTDs:** (Excise Tax Advisories (ETAs), Property Tax Advisories and Bulletins (PTAs/PTBs), and Interim Audit Guidelines (IAGs) are considered interpretive and/or policy statements.)

YES	NO	
<b>X</b>		Are there any statutory changes subsequent to the previous review of this rule that should be incorporated?
<b>X</b>		Are there any interpretive or policy statements not identified in the previous review of this rule that should be incorporated? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	<b>X</b>	Are there any interpretive or policy statements that should be repealed because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed



		form.)
	X	Are there any Board of Tax Appeals (BTA) decisions, court decisions, or Attorney General Opinions (AGOs) subsequent to the previous review of this rule that provide information that should be incorporated into this rule?
X		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) subsequent to the previous review of this rule that provide information that should be incorporated into the rule?
X		Are there any changes to the recommendations in the previous review of this rule with respect to any of the types of documents noted above? (An Ancillary Document Review Supplement should be completed if any changes are recommended with respect to an interpretive or policy statement.)

If the answer is “yes” to any of the questions above, identify the pertinent document(s) and provide a brief summary of the information that should be incorporated into the document.

**Information from the following, or in some cases a cross-reference to other rules discussing the subject matter, should be incorporated into Rule 118:**

- **ETA 232.08.118, Parking Fees as Income from Rental of Real Estate -- explains that where parking spaces were rented for periods in excess of 30 days, the parking fees were derived from the rental of real estate and were not subject to retail sales tax.**
- **Chapter 178, Laws of 2002 amended the definition of "retail sale" found in RCW 82.04.050 to add a presumption that the sale of and charge made for lodging for a continuous period of one month or more is a rental or lease of real property and not a mere license. This change is in addition to the previous presumption that occupancy of real property for a continuous period of one month or more constituted a rental or lease.**
- **Det. No. 97-198, 17 WTD 089 (1997) -- Taxpayer held certain properties in trust for members who could purchase "points" to be used to acquire the right to stay at the property. The determination held that since no real estate interest was transferred to members, a timeshare license was created and was subject to B&O and retail sales tax where the stays were less than 30 days.**
- **Det. No. 99-345, 19 WTD 618 (2000) -- Where taxpayer provided space for Internet servers but did not grant exclusive possession of the area, the arrangement created a mere license to use real estate and was not the rental or lease of real estate.**

**3. Additional information:** Identify any additional issues (other than those noted above or in the previous review) that should be addressed or incorporated into the rule. Note here if you believe the rule can be rewritten and reorganized in a more clear and concise manner.

**4. Listing of documents reviewed:** The reviewer need identify only those documents that were not listed in the previous review of the rule(s). Use “bullets” with any lists, and include documents discussed above. Citations to statutes, interpretive or policy statements, and similar documents should include titles. Citations to Attorney General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).



Statute(s) Implemented:

Interpretive and/or policy statements (e.g., ETAs, PTAs, and IAGs):

**ETA 232.08.118, Parking Fees as Income from Rental of Real Estate**

Court Decisions:

***Lacey Nursing Center, Inc. v. Department of Revenue*, 103 Wn. App. 169, 11 P.3d 839 (2000)**  
**-- The provision of rooms to residents of nursing homes was not the rental of real estate because the primary nature of the arrangement was to provide necessary medical services; provision of the rooms was secondary to this service. Taxpayer could not bifurcate income to reflect a separate rental charge because it was not engaging in separate business activities but was engaged in a single activity with multiple components.**

Board of Tax Appeals Decisions (BTAs):

Appeals Division Decisions (WTDs):

- **Det. No. 97-198, 17 WTD 089 (1997) -- Taxpayer held certain properties in trust for members who could purchase "points" to be used to acquire the right to stay at the property. The determination held that since no real estate interest was transferred to members, a timeshare license was created and was subject to B&O and retail sales tax where the stays were less than 30 days.**
- **Det. No. 99-345, 19 WTD 618 (2000) -- Where taxpayer provided space for Internet servers but did not grant exclusive possession of the area, the arrangement created a mere license to use real estate and was not the rental or lease of real estate.**
- **Det. No. 00-154ER, 21 WTD 298 (2002) -- The right obtained under mineral leases (right to remove minerals from property without providing title to minerals still in the ground) was not the rental or lease of real estate but would be considered a license as described in Rule 118.**

Attorney General Opinions (AGOs):

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed):

**A Special Notice -- Changes to the Definition of Rental of Real Estate for Hotels and Motels, issued July 3, 2002, was issued to announce the changes enacted by ch. 178, Laws of 2002.**



## 5. Review Recommendation:

- X              **Amend**
- Repeal/Cancel** (Appropriate when action is not conditioned upon another rule-making action or issuance of an interpretive or policy statement.)
- Leave as is** (Appropriate even if the recommendation is to incorporate the current information into another rule.)
- Begin the rule-making process for possible revision.** (Applies only when the Department has received a petition to revise a rule.)

**Explanation of recommendation:** Provide a brief summary of your recommendation, whether the same as or different from the original review of the document(s). If this recommendation differs from that of the previous review, explain the basis for this difference.

If recommending that the rule be amended, be sure to note whether the basis for the recommendation is to:

- Correct inaccurate tax-reporting information now found in the current rule;
- Incorporate legislation;
- Consolidate information now available in other documents (e.g., ETAs, WTDs, court decisions); or
- Address issues not otherwise addressed in other documents (e.g., ETAs, WTDs, court decisions).

**The previous reviewer recommended that there was no need for revision. I believe the rule should be revised to discuss the following topics:**

- **Treatment of long-term rental of parking spaces (ETA 232.08.118).** (Note – This reviewer questions whether the ETA necessarily states the correct legal result);
- **Treatment of ownership of timeshare units as rental/lease vs. license (17 WTD 089);**
- **Treatment of provision of computer space (19 WTD 618);**
- **Treatment of nursing home rooms and availability of segregating income from different activities (*Lacey v. Dept. of Revenue*), though a cross-reference to WAC 458-20-168 is an alternative; and**
- **Changes re: "sale of and charge for" hotel/motel rooms as provided in ch. 178, Laws of 2002, though a cross-reference to WAC 458-20-166 is an alternative.**

The determinations and court case cited above expand upon the general factors used to distinguish rentals/leases from licenses. The discussion regarding the use of these factors generally should be expanded to parallel the tests applied in the determinations and by the courts. Finally, the current structure of the rule is confusing -- e.g. the direction to segregate income where more than one kind of business activity occurs is found in sub-(a) under "(3) License to use real estate." The rule could be restructured to make it easier to find relevant information and to improve its analytical clarity.



**6. Manager action:** Date: 8/5/03

AL Reviewed and accepted recommendation

Amendment priority:

       1  
       2  
  X   3  
       4